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CURRENT TOPICS.

The English case of Garrard v. Lewis, which we recently digested (16 Cent. L. J. 357), holding that the marginal figures upon a bill of exchange, expressive of the amount, are no part of an instrument, and that an alteration of them would not vitiate it, has been exactly paralleled by the decision of the Supreme Court of Wisconsin in Johnston Harvester Co. v. McLean, March 13, 1883. In that case the defendant signed a note when it was blank as to the amount, except that the margin contained the figures $45. These figures were subsequently changed to $450, and the blank filled up for that amount, and the note negotiated. Upon its being urged against the plaintiff, who was an innocent holder for value, that the paper was not within the rule that the signing of a negotiable instrument containing blanks impliedly authorizes the filling of such blanks, because of the presence of the figures in the margin, the court (TAYLOR, J.), said: "The answer to this objection is, that the figures were not a part of the note; and, further, that if any alteration of the figures was made, such alteration was not known to the parties receiving the note, and there was nothing on the face of the note which would ineicate that such alteration had been made. 2 Pars. Notes & Bills, 546; Poorman v. Mills, 39 Cal. 345, 356; Schryon v. Hawks, 22 Ohio St. 308; Smith v. Smith, 1 R. I. 399; Reiley v. Dickens, 19 Ill. 29; Garrard v. Lewis, 47 Law T. Rep. (N. S.) 408."

In re Leslie; Leslie v. French, the English High court has just decided thnt the mere payment of the premiums upon a life policy by a stranger to it, or indeed by a part owner will not create a lien upon it in his favor. The circumstances, in which such a lien will result, are aptly stated by PEARSON, J., as follows: "In my opinion, a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases:—1. By contract with a beneficial owner of the policy. 2. By reason of the right of the trustees to an indemnity out of the trust property for money expended by them in its preservation. 3. By subrogation to these rights of the trustees of some person who may have advanced money at their request for the preservation of the property. 4. By reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to that charge any moneys which have been paid by them to preserve the property.

An instance of the first class of cases to which I have referred—viz., the creation of a lien by contract with the beneficial owner—is to be found in the case of Aylwin v. Witty, 9 W. R. 720, where the Vice-Chancellor Kindersley held that where a mortgagor had contracted with the mortgagee to pay the premiums, and there were sureties for the performance of the contract by the mortgagor, and the sureties had been called upon, and had paid the premiums, they were entitled, as against the mortgagor, to a lien upon the policy moneys. It is obvious that in this case the sureties were, by contract with the principal debtor, entitled to the benefit of all the securities which the mortgagee could have enforced, and, amongst others, to a charge for the premiums paid. The second and third classes of cases are well illustrated by Clack v. Holland, 19 Beav. 262, in which it was held that trustees who paid moneys under circumstances which gave them no right to a charge, could not create a charge in favour of any third person from whom they borrowed moneys. To the same class may be referred the case of Gill v. Downing, L. R. 17 Eq. 316, in which mortgagees, whose title as such was good after, and only after, the death of the tenant for life, were held entitled to a lien during the subsistence of the tenancy for life. The mortgagees were placed by subrogation in the place of the trustees. Again, in the case of Todd v. Moorhouse, L. R. 19 Eq. 69, the right of trustees to create a lien by subrogation of their rights was recognized, and it was determined that a person paying at the request of the trustees did not lose the right to the lien simply because the trustees might possibly have taken some other course to preserve the property.

Such appears to me to be the classes of cases in which a lien is created by payment of premiums.

CIVIL LIABILITIES OF LUNATICS.

"Sane or insane," is often a question of thrilling interest and infinite complications in criminal cases, and, quite as frequently is the leading issue in testamentary causes. What constitutes insanity, what abnormal condition of the mental faculties, will suffice to transfer a prisoner from the dock of a criminal court to the wards of a hospital for the insane; or more frequently to the absolute liberty of private life, or to abrogate the alleged will of a testator, is too broad a question to be discussed, even in a perfunctory manner, in a single article. I do not propose to enter except incidentally, into that field of investigation, but to inquire what are the civil consequences, lunacy being conceded, to the estate of the lunatic, of his actions, his so-called contracts, and the torts which he may perpetrate.

As the liabilities of lunatics must needs grow out of the contracts into which they enter, or the wrongs which they inflict upon the persons or property of others, the subject divides itself into these two heads. A contract is said to be a *consensus*, a meeting of minds, and of course there are many lunatics of whom such a meeting of minds is in no sense predicable. It would be absurd to connect the idea of contract with one laboring under *dementia*, wholly deprived of reason, or the equally unfortunate idiot in whom the reasoning faculty has never been developed. Mental disease, however, rises by many gradations from the mere flaw of slight eccentricity to the total ruin of absolute *dementia*, and the law would be far indeed from being the "perfection of reason" if it took no note of this wide margin, and applied the same rules to the actions of a monomaniac, whose infirmity related only to a single unimportant subject, as to the raving madman or the mowing idiot.

What privation of understanding, or perversion of reason, will suffice to avoid a contract is too broad a question to be treated exhaustively within our limits, but as it is desirable to draw the line somewhere, and adopt some rule, a higher authority can hardly be found than that of Chancellor Kent.[1] He says: "Imbecility of mind is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties, or an incapacity of understanding, and acting with discretion, in the ordinary affairs of life. This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. The law can not undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers, does not incapacitate him." To this may be added the remarks of Mr. Parsons,[2] who says: "Courts of law, as well as of equity, afford protection to those who are of unsound mind. They endeavor to draw a line between sanity and insanity, but can not so well distinguish between degrees of intelligence. Against the consequences of mere imprudence, folly, or that deficiency of intellect which makes mistake easy, but does not amount to unsound or disordered intellect, even equity gives no relief, unless the other party has made use of his want of intelligence to do a certainly wrongful act."[3] It is well understood that in many forms of insanity the capacity to transact business is entirely unaffected, and in such cases, the fact of insanity can not be set up to avoid business transactions.[4]

The rule being thus laid down, although in general terms, the question occurs, who is entitled to avail himself of the "incapacity of understanding and acting with discretion in the ordinary affairs of life." The common law rule, it is said, was that no man could be permitted to stultify himself and escape from the consequences of his legal acts, by reason of mental disease or deficiency.[5] That this was the law as administered in England, is beyond all question, but that it was a maxim of the common law as asserted

[1] Kent. Comm. 53

[2] 1 Parsons on contracts, 383.

[3] See Severs v. Pumphrey, 24 Ind. 231; Hovey v. Hobson, 55 Me. 256; Miller v. Craig, 36 Ill. 109; Speers v. Sewell, 4 Bush. (Ky.) 239; Hovey v. Chase; 52 Me. 304; Odell v. Buck, 21 Wed. 142; Davis v. Culver, 13 How. (N. Y.) Pr. 62; Rippey v. Gaunt, 4 Ired. (N. C.) Eq. 443; Samuel v. Marshall, 3 Leigh. (Va.) 567; Smith v. Elliott, 1 Patt. & H. (Va.) 307; Bahea v. McLeennon, 1 Ired. (N. C.) L. 523; Ballew v. Clarke, 2 Ired. (N. C.) L. 23; Bensell v. Chancellor, 5 Whart. Pa. 371; Lozear v. Shields, 23 N. J. (Eq.) 509; Helley v. Troester, 72 Mo. 73.

[4] Searle v. Galbraith, 73 Ill. 269; Ekin v. McCracken, 11 Phila. 534; Kneedler's Appeal, 92 Penn. St. 428.

[5] 5 Bacon Abridg. 25 & seq.; Beverley's case, 4 Coke, 123; Co. Litt. 147.

by Coke, is not so clear. Blackstone says:[6] "The progress of this notion is somewhat curious. In the time of Edward I, *non compos* was a sufficient plea to avoid a party's own bond, and there is a writ in the register for the alienor himself to recover lands alienated by him during his insanity; *dum fuit non compos mentis sucæ ut dicit*, etc. But under Edward III., a scruple began to arise. * * Under Henry VI., this way of reasoning (that a man shall not be allowed to disable himself by pleading his own incapacity) * * was seriously adopted by the judges in argument, * * * and from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason, the maxim that a man shall not stultify himself hath been handed down as settled law."

The rule, however, in England, has been materially modified, although it appears that neither a lunatic nor his representatives can avoid any act of record as a fine and recovery.[7] Yet in equity where there has been a purchase, at great undervaluation, a fine and recovery, suffered by a lunatic, has been set aside.[8] This, however, it may be remarked, stands upon the general ground of equity powers in cases of fraud.

As to matters *in pais*, lunacy was permitted to be given in evidence under a plea of *non est factum* as early as 1738,[9] and this relaxation of the absurd rule has been followed in many other cases. Heirs, executors and personal representatives, may, on the ground of the lunacy of the ancestor or testator, avoid his act (*in pais*) done while laboring under that disability.[10] Privies in blood and representation, it is said, "may avoid the deeds of lunatics or infants, but privies in law or estate, cannot."[11]

In the United States, the rule that a man of full age, may not avail himself, as a defense of his own insanity, has never been generally recognized as obligatory upon the courts, and in a well considered case,[12] after seriously questioning the existence and authority of the rule, the court adds: "Nor would we feel ourselves bound to adopt it, although it were supported by less questionable English authorities, because the property and interests of idiots and lunatics are not protected here as they are in England by the royal prerogative."

Although mental capacity is undoubtedly necessary to the validity of an express contract, which derives its force from the mutual agreement of the parties, lunatics may be held responsible as upon implied contracts, for reasonable and necessary supplies and services, and it seems that such a contract may be as well implied, in case of total as of partial mental incapacity. In the case of Bagster v. Earl of Portsmouth,[13] Abbott, C. J. said, "that plaintiff's right to recover should not be defeated, as the action was brought for the hire and use of carriages, suited to the degree and state of the defendant, and by him actually ordered and enjoyed." * * * The court adds: "I, however, took care to distinguish this from the case of an unexecuted contract, and from the case of an agreement entered into under such circumstances as might lead any reasonable person to conclude that at the time it was made, the party was of unsound mind. A case of the latter description would come under that class in which imposition is practiced, or advantage taken of the mental infirmity of the contracting party."

In this case, it seems that there was an express contract in writing, for the use of the carriages, but this was waived by the court who founded its judgment upon the implied contract for necessaries suitable to the rank and degree of the defendant. In this and in many other cases, the liability of lunatics is placed upon the same footing, as that of infants. It seems, however, that the board etc. of a lunatic at an asylum, can not be collected from his estate, if there was a contract for these charges between the authorities of the asylum and other parties, for where there is an express contract, there is no room for an implied one—even for necessaries.[14]

[6] 2 Bl. Com. 291.

[7] 5 Bacon Abridg. 25; 4 Co. 124; Co. Litt. 147.

[8] Addison v. Dawson, 2 Vernon, 678; Milner v. Turner, 4 Monr. (Ky.) 244.

[9] Yates v. Boen, 2 Str. 1104.

[10] 5 Bacon Abridge, 22.

[11] Breckenridge v. Ormsby, 1 J. J. Mars. 248; See Cotes v. Woodson, 2 Dana. 454.

[12] Mitchell v. Kingman, 5 Pick. 431; See also Lang v. Whedden, 2 N. H. 435; Webster v. Woodford, 3 Day, (Conn.) 90; Rice v. Peet, 15 Johns. 503; Morris v. Clay, 8 Jones (N. C.) L. 216; Grant v. Thompson, Conn. 203; Horner v. Marshall, 5 Munf. 466.

[13] 5 B. & C. 170; S. C., 7 D. & R. 614; S. C., 2 C. & P. 178; See also Sawyer v. Lufkin, 56 Me. 308; Seaver v. Phelps, 11 Pick. 304; Leach v. Marsh, 47 Me. 548.

[14] Mass. Gen. Hosp v. Fairbanks, 129 Mass. 78; See

There are other English cases, that go much further than this, in holding lunatics liable, not only on implied contracts for necessaries, but upon express contracts as well. In Nelson v. Duncombe,[15] a lunatic was held responsible for the expenses of five years' confinement in an asylum—by a volunteer—without a commission of lunacy, and without any legal authority to control the person of the lunatic. And this, although upon making his escape, the defendant was pronounced by medical authority, not absolutely sane, certainly, but more fit to be at large, than to be confined in an asylum.

Dane v. Kirkwall,[16] was a still stronger case. There was a written agreement between the parties, that Lady Kirkwall should take Dane's house for a certain term. She was a lunatic, had another residence, and no use for the house, and in this action, for use and occupation, it was ruled that it was necessary not only to prove her insanity, but to show that the plaintiff knew her condition and took advantage of it. By this ruling, it would appear that in order to avoid a contract, of one who by law was incapable of making a contract, it was necessary to aver and prove actual fraud in fact perpetrated by the other party.

In Brown v. Joddrell,[17] as late as 1821, Lord Tenterden adhered in express terms to the old doctrine, that a party can not be permitted to stultify himself and refused to admit evidence of the insanity of the defendant at the time of making the contract. The action he held to be maintainable unless there was evidence of imposition on the part of the plaintiff. And in Neil v. Morley,[18] the lunatic, apparently sane, bought a lot of building material in May, and in the August following an inquisition found that he had been insane for three years previous to the purchase. A bill was filed, by his committee, to recover back the money, but the transaction appearing fair, Sir W. Grant refused the relief prayed for, protesting against the principle of *ex post facto* abrogation of contracts. He said: "Assuming it to be the legal consequence, that every act of the lunatic, subsequent to the time found by the jury, is absolutely void, nothing can be more inconvenient than for this court to give effect to that legal consequence, setting aside every dealing in the course of his trade, giving an account of all that he has lost etc. * * * "If the plaintiff is right in saying all this is void at law, let him resort to law and recover if he can."

Whether the parties can be put in *statu quo* is a very material consideration in questions of this character. In Molton v. Cameroux,[19] where one, apparently sane, but really of unsound mind, made a fair and *bona fide* purchase of property, which was fully completed, payment made, and property delivered it was held that as the parties could not be put in *statu quo* the contract could not be set aside, either by the alleged lunatic or by those representing him. And in another case,[20] there was a like ruling, the contract having been made, and the money paid by the plaintiff, while he was a lunatic. It was held that as the defendant executed the contract and received the money in good faith, and without knowledge of the lunacy, he could not be compelled to pay it back.

In Selby v. Jackson,[21] the plaintiff being embarrassed, in his circumstances, became insane, the defendants intervened in his affairs, became personally responsible for a considerable portion of his debts, effected a composition with his creditors, and when he was restored to his right mind, held in trust, for him, the remnants of his fortune. He filed this bill to set aside the deeds executed by him in the settlement of his estate, (which had been indeed signed by him in the lunatic Asylum, with one hand fettered), upon the ground that they were void on account of his insanity, and claimed the whole remainder of his estate, without providing for the re-imbursement of the defendants, for the money that they had advanced in the liquidation of his debts. The court refused the relief prayed for, except upon such terms, as would indemnify the defendants. The ruling in this case, and indeed in all the cases looking to a restoration of the antecedent condition of affairs, may be fully justified upon the general prin-

Whiting v. Sullivan, 7 Mass. 107; Cahill v. Bigelow, 18 Pick. 369; Swift v. Pierce, 13 Allen 136; Walker v. Moore, 125 Mass. 352.

15 9 Beav. 211.

16 8 Carr. & P. 679.

17 3 Carr. & P. 30.

18 9 Vesey. 478.

19 4 Exch. 17: s. c., 2 Exch. 487.

20 Beavan v. McDonnell, 9 Exch. 309.

21 6 Beav. 200.

ciples of equity, without any special reference to the law relating to lunacy. All these, it may be observed, are English cases, and many of the American courts refuse to follow them. In Seaver v. Phelps,[22] the court intimates that the ruling in Brown v. Joddrell,[23] is founded on the old rule, somewhat qualified, that no one can be allowed to plead his own disability or incapacity, in avoidance of his contracts. This rule, the court adds, has been wholly exploded in this country.[24] Although in this, the court was undoubtedly right, there are many cases in which a court of equity will protect the other party from the unjust consequences of an assertion of the disability, and in effect, enforce his contract against the lunatic, (or his committee,) to the same extent as if he were sane. Several cases of this character, have already been cited from the English books,[25] generally proceeding upon the principle that it would be unjust to abrogate the contract, unless the antecedent condition of affairs could be restored.

The same doctrine has been held in numerous American cases, in effect that, although a lunatic has no legal capacity to contract, yet a court of equity will not interfere where he has had the benefit of the property of the other party, if the contract has been made in good faith, without knowledge of the lunacy or incapacity, and where no advantage has been taken of the situation of the party.[26]

Upon the same principle, in Behrens v. McKenzie,[27] it was held that as the lunatic had enjoyed the benefit of the contract sought to be avoided, and there was no possibility of putting the parties in *statu quo*, it was proper in the trial court to exclude evidence of the insanity of the defendant. The action was on an injunction bond executed by the defendant, upon which an injunction had been issued, of which he had enjoyed whatever advantage there was in it. In making this ruling, the court (Dillon, J.) held the law to be that, with respect to executed contracts, lunatics were responsible where the transaction was in the ordinary course of business, was fair and reasonable, the peculiar mental condition of the patient unknown to the other party, and the circumstances such that the parties could not be put in *statu quo*.[28] The case, however, the court said, was peculiar in this, that the bond being statutory, was filed without consulting the adverse party. In that respect, perhaps, it lacked the most important element of a contract, the assent of one of the parties.

Lunatics are not liable on executory contracts, and in no event, and under no circumstances, can they be held responsible upon a contract of suretyship.[29] The mitigation of the general rule that their contracts are invalid, proceeds either upon the principle that the strict enforcement of the rule would shock the conscience, or that its modification enures really to the ultimate benefit of the lunatics themselves, as, for example, enabling them to provide themselves with suitable necessaries of life.

The inconvenience and injustice of the rule against which Sir W. Grant protests so earnestly,[30] of permitting an inquisition of lunacy to fix the period of irresponsibility far back in the past, is strikingly illustrated in the case of Person v. Warren.[31] In that case it appears from the opinion of the court that Fuller was insane from 1831 to 1849, but was permitted by his friends during all that time to trade and traffic, buy and sell property, and carry on business generally, until the last named year, when he made an unprofitable contract. "Then," said the court, "a commission is issued and an inquisition found relating back more than eighteen years, by

[22] 11 Pick. 304.

[23] *Supra.*

[24] Mitchell v. Kingman, 5 Pick. 431; Webster v. Woodford, 3 Day, 90; Lang v. Whidden, 2 N. H. 435; Grant v. Thompson, 4 Conn. 203; Rice v. Peet, 15 Johns. 503.

[25] Neil v. Mosley, *supra:* Moulton v. Cameroux, *supra*; Beavan v. McDonnell, *supra;* Selley v. Jackson, *supra.*

[26] Carr v. Holliday, 1 Dev. & Batt. Eq. 344; Loomis v. Spencer, 2 Paige Ch. 153. See also Searle v. Galbraith, 73 Ill. 269; Scanlan v. Cobb, 85 Ill. 296.

[27] 23 Iowa, 333.

[28] See Molton v. Cameroux, 2 Exch. 487; s. c., 4 Exch. 17; Beals v. Lee, 10 Pa. St. 56; Mann v. Betterly, 21 Vt. 326; La Rue v. Gilkeson, 4 Penn. St. 375 See also Jones v. Perkins, 5 B. Mon. (Ky.) 222; Ballard v. McKenna, 4 Rich. (S. C.) Eq. 358; Sims v. McClure, 8 Rich. (S. C.) Eq. 286; Dods v. Wilson, 1 Tread. Const. Rep. (S. C.) 448; Lincoln v. Buckmaster, 32 Vt. 652; Matthiessen v. McMahon, 38 N. J. L. 536; Mutual. etc. Co. v. Hunt, 79 N. Y. 541; Beavan v. M'Dowell, 9 Exch. 309; Person v. Warren, 14 Barb. 488, 496; Long v. Long, 9 Md. 348; Story's Eq., secs. 228, 238; Riggan v. Green, 80 N. C. 236; McCormack v. Littler, 85 Ill. 62.

[29] Van Patton v. Beals, 46 Iowa, 62.

[30] Neil v. Morley, 9 Ves. Jr. 478.

[31] 14 Barb., 488.

which all his bad contracts are to be set aside and his good ones enforced." In disposing of the case the court, following Neil v. Morley,[32] says: "There is no ground for a court of equity to advance the remedy where it is impossible to exercise the jurisdiction, so as to afford any chance of doing justice to the other party. When this court does interfere, it endeavors to put the parties in the same situation, that is, when the contract is void." And adds, in effect, that no relief will be granted to the plaintiff (the lunatic's committee) without his doing equity.

The similarity of the contracts of lunatics to those of infants has already been alluded to. The contracts of persons laboring under the former, as well as of those under the latter disability, are voidable,[33] and can be set aside if based upon other considerations than that of necessaries suitable to the party's condition in life.[34] It is said, however, that where a person has been duly adjudged lunatic and placed under guardianship, his contracts are absolutely void,[35] "that the decree and letters of guardianship take from him all capacity to convey." In this, as in many other matters, the distinction between "void" and "voidable" is seldom very rigidly preserved, courts being prone to hold, as in the case of Crouse v. Holman,[36] that when a statute says "shall be void," it means "shall be voidable."

The proof of a state of lunacy is often a matter of great difficulty in practice, although the general principles controlling it are sufficiently simple. The presumption of law is that all men are sane, and it is, therefore, incumbent upon the party who alleges the insanity of any person, to prove it. The burden of proof shifts, however, after inquest found, or insanity has otherwise been duly proved to exist. That condition, it is then presumed, will continue indefinitely, and it devolves upon him who relies upon a lucid interval, or who asserts that the patient's mental health has been fully restored, to furnish the necessary evidence of the truth of his allegation.[37]

These presumptions are of special importance in cases in which a lucid interval is relied upon. A contract made during such an interval is undoubtedly valid, but if the antecedent insanity has been, or can be, established, the presumptions of law are all against the existence of the lucid interval, and the burden of proof is thrown upon him who asserts it.[38]

Mental incapacity produced by drunkenness is a sufficient defense against a contract entered into by a party while in that condition, and this whether the contract be parol or authenticated by deed. Drunkenness of itself, unless fraud be practiced, will not avoid a contract; it must be so great as to produce for the time an absolute privation of understanding.[39] A contract entered into by a person in a state of intoxication, although it be not produced by the procurement of the other party, may be set aside after his death at the instance of his personal representatives.[40] Of course, in such case, it is necessary that the drunkenness be proved to be of such a character as to deprive the party of

[32] *Supra.*

[33] Crouse v. Holman, 19 Ind. 30; Wait v. Maxwell, 5 Pick. 217; Aller v. Billings, 6 Metc. 415; Arnold v. Richmond Iron Works, 1 Gray, 434; Chew v. Bank of Baltimore, 14 Md. 318; Arnold v. Richmond Iron Works, 1 Gray, 434; Breckenridge v. Ormsby, 1 J. J. Marsh. 236.

[34] Fitzgerald v. Reed, 17 Miss. (9 Sm. & M.) 94; Crowther v. Rowlandson, 27 Cal. 376; Maddox v. Simmons, 31 Ga. 512; Richardson v. Streng, 13 Ired. N. C) L. 106; *Ex parte* Northington, 1 Ala. Sel. Cas. 400; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658; Skidmore v. Romaine, 2 Bradf. (N. Y.) 122. See also Darby v. Cabanne, 1 Mo. App. 126.

[35] Wait v. Maxwell, *supra.* See also Elston v. Jasper, 45 Tex. 409; Nichol v. Thomas, 53 Ind. 42; Mohr v. Tulip, 40 Wis. 66.

[36] *Supra.*

[37] Armstrong v. Tinnons, 3 Har. (Del.) 342; Hoge v. Fisher, Pet. C. C. R. 163; Wray v. Wray, 33 Ala. 187; Myatt v. Walker, 44 Ill. 485; Achy v. Stephens, 8 Ind. 411; Crouse v. Holman, 19 Ind. 30; Jackson v. Van Dusen, 5 Johns. 144; Jackson v. King, 4 Cow. 207; Cook v. Cook, 53 Barb. 180; Lee v. Lee, 4 McCord, 182; Lilly v. Waggoner, 27 Ill. 395; Haynes v. Swann, 6 Heisk. (Tenn.) 560. But see Turner v. Rusk, 53 Md. 64.

[38] Lilly v. Waggoner, 27 Ill. 395; Hall v. Warren, 9 Ves. Jr. 605; Tozer v. Satterlee, 3 Grant (Pa.) Cas. 162.

[39] Jenners v. Howard, 6 Blackf. 240; Harbison v. Lemon, 3 Blackf. 51. See also Molton v. Camroux, 7 Exch. 17, 19; Gore v. Gibson, 13 M. & W. 623; Yates v. Boen, 5 Str. 1104; Cook v. Clayworth, 18 Ves. Jr. 12; Nagle v. Baylor, 3 Dr. & W. 60; Gardner v. Gardner, 22 Wend. 526; Barrett v. Buxton, 2 Aikin, 167; Wigglesworth v. Steers, 1 Hen. & Munf. 70; Seymour v. Delancy, 3 Cow. 445; Rennecker v. Smith, 2 Harr. & J. 421; Prentice v. Achorn, 2 Paige, 30; Lazell v. Pinneck, 1 Tyler, 247; King v. Bryant, 2 Hayw. 394; Rutherford v. Ruff, 4 Dessaus. 364; Burroughs v. Richmond, 13 N. J. L. 233; Taylor v. Patrick, 1 Bibb, 168; Hutchinson v. Browne, 1 Clarke, 408; Foot v. Tewksbury, 2 Vt. 97; Clarke v. Cadwell, 6 Watts, 139; Broadwater v. Darne, 10 Mo. 274; Drummond v. Hopper, 4 Harr. 327; Murray v. Carlin, 67 Ill. 286.

[40] Wrigglesworth v. Steers, 1 Hen. & Munf. 70.

the proper use of his faculties. There must be an essential privation of mental powers.

As all the acts of a lunatic while under the influence of his malady are, if not void, voidable, it follows, of course, that they may be avoided or ratified by him at his pleasure upon his restoration to reason. The acts that will suffice to avoid his contracts made while under this disability, and those which will ratify and confirm such acts, depend upon the general law of contracts, and vary according to the nature of the contract and the character and condition of the party doing the act. It will suffice to say that the receipt of rent by a lunatic after his restoration, will operate as an affirmance of a lease made under the disability of insanity;[41] and receiving payment of purchase money notes constitute a ratification of a sale.[42]

In this connection it is proper to remark that an agency created by a lunatic prior to his disability is revoked by that calamity, if it is of such a character as to deprive him of the power of binding himself by his own acts, but not if he still retained so much capacity as would render him liable on a contract of his own personal making.[43]

It is a principle of the common law that a lunatic who commits a trespass on the person or property of others is amenable in damages to be recovered in a civil action,[44] and this although he is incapable of design, for wherever a person receives an injury by an act of immediate force acting upon his person or property, it is a trespass, whether voluntary or involuntary. As to the liability, there is absolutely no difference between the sane and the insane, but concerning the measure of damages, there is a material distinction to be taken. Against a sane person committing a tort, exemplary or punitive damages can, in proper cases, be recovered, because the motive which influenced the defendant may be taken into the account; but with respect to the lunatic who has really no will, the appropriate measure of damages is the mere compensation of the party injured.[45] Another material distinction should be taken. A sane person is liable, of course, for wrongs in which malice is an essential part, and the damages recovered are augmented in proportion to the virulence of the ill-feeling which prompted the injury. In case of a lunatic no such considerations have any proper place, and wherever the *gravamen* of the charge is the malice supposed to have actuated the perpetrator of the wrong, the lunatic can not be held liable at all; he is supposed to be capable only of the unreasoning anger of the brute, not of the deliberate venom of the sane man. Hence it has been held that insanity is a good defense in an action for slander,[46] unless the slanderous words were spoken in a lucid interval, for during such intermission the lunatic is, in the eye of the law, sane. It is necessary, however, that the fact of insanity, at the time of speaking the slanderous words, be made to appear by direct evidence, and can not be established by general reputation;[47] not that it is necessary that there should be direct evidence of actual insanity at the moment of speaking the words, but such proof must be made of antecedent and subsequent derangement as would satisfy a jury of the fact.[48] When, however, the fact of insanity is established, the law fully protects the lunatic, for even after a judgment at law has been recovered for slanderous words spoken by the defendant when insane, a court of equity will perpetually enjoin it.[49] Aberration of mind from drunkenness is equally available as a defense in actions for slander as insanity from any other cause, but it is necessary to show that the degree of besotment was such as to exclude the possibility of malice, for malice is of the very essence of slander.[50]

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41 Tucker v. Moreland, 10 Pet. (35 U. S.) 58.

42 Arnold v. Richmond Iron Works, 1 Gray, 434; Allis v. Billings, 6 Metc. 415.

43 Motley v. Head, 43 Vt. 633; Searles v. Pipkin, 69 N. C. 513; Matthiessen v. McMahon, 38 N. J. L. 536.

44 Ray Med. Jur. 286; Weaver v. Ward, Hobart, 134-14; 7 Bacon Abridg., 492; Morse v. Crawford, 17 Vt. 499; Cross v. Kent, 32 Md. 581.

45 Krom v. Schoonmaker, 3 Barb. 647; Ward v. Conetsen, 4 Baxt. (Tenn.) 64.

46 Bryant v. Jackson, 6 Humph. (Tenn.) 199.

47 Yates v. Reed, 4 Blackf. 463. See also Dickinson v. Barber, 9 Mass. 215; Horner v. Marshall, 5 Munf. 466.

48 Bryant v. Jackson, *supra*.

49 Horner v. Marshall, 5 Munf. 466.

50 Gates v. Meredith, 7 Ind. 440.

CONTRIBUTORY NEGLIGENCE OF INFANTS.

The extremely unsatisfactory *status* of the law in this country in relation to the negligence of infants, calls to mind a few cases bearing upon the point, which may be of advantage to the legal profession. The question seems to be based upon the proposition that a child who is in a dangerous place need not be expected to exercise the same care that a person of more advanced years should, and when the defense of contributory negligence is set up, it will not be allowed to extend to that extreme limit that it would if the plaintiff were an adult. Some of the States have adopted the rule formerly laid down in England, while others have followed the doctrine held in later years. The earlier rule was said to be, that when the plaintiff was a child of tender years, it was no defense to an action of negligence to prove that the child contributed to the injury.[1] In this case the plaintiff, a child of seven years, climbed up on the cart of the defendant, whose horse had been left unattended in the street, to play. Another child led the horse on, and the plaintiff was thereby thrown down and hurt. Held, that the defendant was liable, although the negligence of the child contributed to the injury. Later, in England, it was held that the principle of contributory negligence should be applied to all cases, whether the plaintiff can be considered of age to know what he is doing, or otherwise.[2]

Contributory negligence does not disentitle an infant to sue for an injury sustained, otherwise than where such negligence is occasioned solely by the negligence of the infant.[3] In Mangan v. Atherton,[4] the defendant exposed a dangerous machine for sale in a public place, which could be set in motion by any person. The plaintiff, a boy of four years, was induced to place his finger in the machine, while another child turned the crank which set it in motion, and caused the plaintiff's fingers to be crushed. Held, that the plaintiff could not maintain the action. This is the state of the law in England upon the question, but in this country the authorities are in still greater conflict. The difference of opinion seems to turn upon one of the three questions: First, whether the same degree of care is to be required from an infant as from an adult; Second, whether the negligence of the parent or guardian having charge of the infant, will defeat a recovery for injuries to such child by another, Third, what amount of evidence of the surrounding circumstances will be required. The reasonable doctrine seems to be, that same degree of care should not be exacted from an infant as from an adult. Surely no person would think of accrediting to a child of three years as much discretion and thoughtfulness as one of fifteen. And here a question arises as to what age, if any rule is laid down upon the subject, should an infant be able to exercise ordinary care. Just the precise age has been said to be a question of law for the court, and of course the circumstances of each individual case must govern.[5]

It is difficult to conceive what should be the material difference between the recovery of a lunatic who had been negligently run over in the street, and recovery by an infant who had been similarly injured, and yet the law apparently makes a distinction.

Upon the first point to be discussed, whether the contributory agency of the child will be available as a defense in an action for the injury; the manifest weight of authority inclines toward the rule that the child can only be held negligent according to his age and capacity.[6]

[1] Lynch v. Nurden, 1 Ad. & El. 29. See Say v. M. R., 34 L. T. 30.

[2] Singleton v. East Counties R. Co.; 7 C. B. (N. S.) 287; Hughes v. Macfie, 7 H. & C. 744. See Lygo v. Newbold, 9 Ex. 302; Mangan v. Atherton, 4 H. & C. 388.

[3] Gardner v. Grace, 1 F. & F. 359.

Supra.

[5] Nagle v. Alleghany Ry., 88 Pa. St. 35.

[6] Robinson v. Cone, 22 Vt. 213; Philadelphia Railroad v. Kelly, 31 Pa. St. 372, Philadelphia Ry. v. Spearm, 47 Id. 300; Oakland R. Co. v. Fielding, 48 Id. 320; North Pennsylvania Ry. v. Mahoney, 57 Id. 187; Kay v. Pennsylvania Ry., 65 Id. 269; Bellefontaine Ry. v. Snyder, 18 Ohio St. 399; Daley v. Norwich Ry., 26 Conn. 591; Norfolk Ry. v. Ormsby, 27 Gratt. 455; St. Paul v. Kirby, 8 Minn. 154; Whirley v. Whittemore, 1 Head, 610; Boland v. Missouri R. Co., 36 Mo. 484; Goot St. Ry. v. Hanlon, 53 Ala. 70; Birga v. Gardiner, 19 Conn. 507; Bronson v. Southbury, 37 Id. 199; Ranch v. Lloyd, 31 Pa. St. 358; Glassey v. Railroad, 57 Id. 172; Railroad v. Hassard, 75 Id. 367; Crissey v. Railroad, 75 Id. 83; Walters v. Railroad, 41 Iowa, 71; Freck v. Railroad, 39 Md. 575; Isabell v. Railroad, 60 Mo. 475; Bryne v. New York Central Ry., 83 N. Y. 620; Donoho v. Vulcan Iron Works, 7 Mo. App. 447; Casey v. New York Central Ry., 6 Abb. N. Cas. 104; Rockford Ry. v. Delaney, 82 Ill 198; McMillan v. Burlington Ry., 46 Iowa, 231;

In Robinson v. Cone,[7] Redfield, C. J., expresses his opinion in the following language: "We are satisfied that, although a child, or idiot, or lunatic may, to some extent, have escaped into the highway, through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed to be of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."

The next question is, whether the negligence of the parent or guardian may be attributed to the child. While the courts pretty generally recognize the principle that a child should not be held to the same accountability as an adult, some of them go much farther and hold that the negligence of the parent in permitting the child to be in a dangerous place, will defeat an action by the child; that the want of care on the part of those having charge of the child, will furnish the same answer to an action brought by the child that it will if ordinary care be omitted by the plaintiff in an action brought by an adult.[8]

Opposed to all this authority comes a case in New York, which holds absolutely that the child must be held to the same degree of care that would be required of an adult. The boy in that case was less than six years old, and while at play was injured by a street car. The court say: "The lad was required to take the same care of himself as any other person. All are held accountable for a reasonable degree of prudence, as to their own safety;"[9]

Lynch v. Smith, 104 Mass. 52; Chicago, etc. Ry. v. Dewey, 26 Ill. 259; Railroad v. Gladmon, 15 Wall. 401; Railroad v. Stout, 17 Id. 657.

[7] *Supra.*

[8] Singleton v. E. C. Ry., 7 C. B. (N. S.) 287; Mangan v. Atherton, 1 Ex. L. R. 239; Brown v. Railroad, 58 Me. 384; Holly v. Boston Gas Co., 8 Gray, 123; Leslie v. Lewiston, 62 Me. 478; Callahan v. Bean, 9 Allen, 401; Hatfield v. Roper, 21 Wend. 615; Flynn v. Hatton, 4 Daly, 552; Morrison v. Railroad, 56 N. Y. 302, Church, C. J. and Andrews, J., dissentient; Chicago v. State, 42 Ill. 174; Railroad v. Vining, 27 Ind. 513; Railroad v. Huffman, 28 Ind. 387; Railroad v. Bowen, 40 Id. 545; Hathaway v. Railroad, 46 Id. 25; Ewan v. Railroad, 38 Wis. 613; Smith v. Railroad, 92 Pa. St. 450; C. & N. Ry. v. Schumilowsky, 8 Ill. App. 618; Evansville Ry. v. Wolf, 59 Ind. 89.

[9] Burke v. Broadway Ry., 49 Barb. 529. Miller, J., dissenting. This case, although it can not be regarded as the law as settled in New York, does not appear to have been expressly overruled.

The negligence of the parent depends, in a great measure, upon his social condition and standing, and the Illinois courts have adopted a very reasonable rule in relation to this. It has been said that a failure to keep a constant watch of the child can not be imputed as negligence on the part of the parents, where they are persons who labor for a living, and their time must be constantly employed.[10]

There has been a distinction made by several of the courts, as to the party who brings the suit; the child, for the injury, or the parent, for loss of services. In the former case the negligence of the parents will not be a defense, while in the latter it may.[11] Of the amount of evidence concerning the circumstances under which the accident happened, no general rule can be laid down, for the facts in each case that arises, are often materially different from any which has preceded it. Many cases hold this evidence varies with each case, and can only be dealt with as it comes up.[12] Here again the difference, in regard to the care which should be taken towards children and adults, comes up, what would not be reckoned negligence towards an adult, might be gross negligence towards and infant.[13]

As we have seen, then all cases which hold that the driver is to be exonerated, if the parent has been negligent in allowing the child to be in an unsafe position, but this rule has been modified in other cases, so as to allow

[10] Chicago v. Hesing, 83 Ill. 204; Chicago v. Major, 18 Id. 349; Chicago, etc. Ry. v. Gregory, 58 Id. 226. To same effect is Kay v. Railroad, 65 Pa. St. 269.

[11] Glossey v. Railraod, 57 Pa. St. 172; Railroad v. Pearson, 72 Id. 169; Railroad v. Snyder, 24 Ohio St. 670; Hunt v. Geiar, 22 Ill. 393; Railroad v. Bowen, 49 Ind. 154; See also Lynch v. Smith, 104 Mass. 52; Railroad v. Wolf, 59 Ind. 89; Penn. Co. v. James, 81 Pa. St. 194.

[12] Railroad v. Stout, 17 Wall. 657; Lovett v. Railroad, 9 Allen, 357; Mulligan v. Curtis, 100 Mass. 512; Lynch v. Smith, 104 Id. 52; Steele v. Burkhardt, Id. 59; Oldfield v. Railroad, 14 N. Y. 310; Drew v. Railroad, 26 Id. 49; Mangan v. Railroad, 38 Id. 455; Downs v. Railroad, 47 Id. 83; Ihl v. Railroad, Id. 317; McMalon v. Railroad, 39 Md. 439; Schierbold v. Railroad, 40 Cal. 447; Hall v. Parks, 40 Cal. 193; Railroad v. Gladmon, 15 Wall. 401.

[13] Schierbold v. Railroad, 40 Cal. 447; Meyar v. Midland, 2 Neb. 319; Pittsburg v. Caldwell, 74 Pa. St. 421; Isabel v. Railroad, 60 Mo. 475.

no defense to the action on the grounds of contributory negligence; that is although the parent, or guardian, was negligent in allowing the child to be unattended, yet if the child committed no act which would constitute negligence in a person of years of discretion, the defendant can not avail himself of this defense.[14]

Laying aside all question of the negligence of the child, as whether as a matter of fact he was negligent or not, there still remains a question as to the negligence of the defendant. Will the defendant be exonerated, although he was negligent, if the negligence of the parent, or the child itself, contributed to the accident? It seems not. An engineer who sees a person on the track, apparently of sound mind, may reasonably expect that he will move off, and consequently may not be guilty of negligence if a collision occur. But if he see a person on the track, incapable of moving off and helpless, he is guilty of negligence in not making all prudent efforts to avoid a collision.[15]

In N. Penn. R. R. v. Mahoney,[16] the child was injured through the negligence of the defendant. The court held that although there might have been negligence on the part of the aunt, yet the negligence of the defendant was such as would render them liable. The rule in this respect appears to be the same as in the case of adults, as adopted by several English courts.

If available, the reader will be interested in an admirable discussion of the subject, by Mr. Wharton,[17] which for soundness of argument and the humanity of the conclusion arrived at, will at once, commend itself.

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[14] McGarry v. Loomis, 63 N. Y. 104; 20 Am. Rep. 510; Lynch v. Smith, 104 Mass. 52; Ibl. v. 42nd St. Ry., 47 N. Y. 317; Cosgrove v. Ogden, 49 Id. 255.

[15] Teifer v. Railroad, 30 N. J. 188; Whaalen v. Railroad, 60 Mo. 323; Schierbold v. Railroad. 40 Cal. 447; Railroad v. Walker, 1 C. & P. 320; Chicago Ry. v. Becker, 76 Ill. 25; Isabel v. Railroad, 60 Mo. 475.

[16] 57 Pa. St. 187.

[17] Whar. Neg. sec. 306, et. seq.

EQUITY—WILL NOT AID FRAUD AND MISREPRESENTATION—TRADE-MARKS.

MANHATTAN MEDICINE CO. v. WOOD.

United States Supreme Court, April 2, 1883.

1. A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guard the purchaser of the medicine.

2. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of another, and at a different place, when, in fact, it is manufactured by a different person at a different place, it is a fraud upon the public which no court of equity will countenance.

3. If sales made by the complainant firm are effected or sought to be effected by misrepresentation and falsehood, he can not be listened to when he complains that, by the fraudulent rivalry of others, his own fraudulent profits are diminished.

Appeal from the Circuit Court of the United States for the District of Maine.

Philo Chase and *Thorndike Saunders*, for appellant; *Wm. Henry Clifford*, for appellee.

FIELD, J., delivered the opinion of the court:

This is a suit in equity to restrain the defendants from using an alleged trade-mark of the complainant, upon certain medicines prepared by them, and to compel an accounting for the profits made from its use in their sales of the medicines; also, the payment of damages for their infringement of the complainant's rights. The complainant, a corporation formed under the laws of New York, manufactures in that State medicines designated as "Atwood's Vegetable Physical Jaundice Bitters," and claims as its trade-mark this designation, with the accompanying labels. Whatever right it possesses it derives by various mesne assignments from Moses Atwood, of Georgetown, Massachusetts. The bill alleges that the complainant is, and for a long time previous to the grievances complained of, was the manufacturer and vendor of the medicine mentioned; that it is put up and sold in glass bottles with 12 panel-shaped sides, on five of which, in raised words and letters, "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," are blown in the glass, each bottle containing about a pint, with a light-yellow printed label pasted on the outside, designating the many virtues of the medicine, and the manner in which it is to be taken; and stating that it is manufactured by Moses Atwood, Georgetown, Massachusetts, and sold by his agents throughout the United States. The bill also alleges that the bottles thus filled and labeled are put up in in half-dozen packages with the same label on each package; that the medicine was first invented and put up for sale about twenty-five years ago by one Dr. Moses Atwood, formerly of Georgetown, Massachusetts, by whom, and his assigns and successors, it has been

ever since sold "by the name, and in the manner, and with the trade-marks, label and description substantially the same as aforesaid;" that the complainant is the exclusive owner of the formula and receipt for making the medicine, and of the right of using the said name or designation, together with the trade-marks, labels and goodwill of the business of making and selling the same; that large sales of medicine under that name and designation are made, amounting annually to 12,000 bottles; that the defendants are manufacturing and selling at Portland, Maine, and at other places within the United States unknown to the complainant, an imitation of the medicine, with the same designation and labels, and put up in similar bottles, with the same, or nearly the same, words raised on their sides, in fraud of the rights of the complainant and to its serious injury; that this imitation article is calculated and was intended to deceive purchasers, and to mislead them to use it instead of the genuine article manufactured by the complainant, and has had, and does have, that effect. The bill, therefore, prays for an injunction to restrain the defendants from affixing or applying the words "Atwood's Vegetable Physical Jaundice Bitters," or either of them, or any imitation thereof, to any medicine sold by them, or to place them on any bottles in which it is put up, and also from using any labels in imitation of those of the complainant. It also prays for an accounting of profits and for damages.

Among the defenses interposed are these: That Moses Atwood never claimed any trade-mark of the words used in connection with the medicine manufactured and sold by him; and assuming that he had claimed the words used as a trade-mark, and that the right to use them had been transferred to the assignor of the complainant, it was forfeited by the misrepresentation as to the manufacture of the medicine on the label accompanying it—a misrepresentation continued by the complainant.

In the view we take of the case it will not be necessary to consider the first defense mentioned, nor the second, so far as to determine whether the right to use the words mentioned as a trade-mark was forfeited absolutely by the assignor's misrepresentations as to the manufacture of the article. It is sufficient for the disposition of the case that the misrepresentation has been continued by the complainant. A court of equity will extend no aid to sustain a claim to a trade-mark of an article which it puts forth with a misrepresentation to the public as to the manufacture of the article and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine.

It is admitted that whatever value the medicine possesses was given to it by its original manufacturer, Moses Atwood. He lived in Georgetown, Massachusetts. He manufactured the medicine there. He sold it with the designation that it was his preparation, "Atwood's Vegetable Physical Jaundice Bitters," and was manufactured there by him. As the medicine was tried and proved to be useful, it was sought for under that designation, and that purchasers might not be misled, it was always accompanied with a label, showing by whom and at what place it was prepared. These statements were deemed important in promoting the use of the article and its sale, or they would not have been continued by the assignees of the original inventor. And yet they could not be used with any honest purpose when both statements had ceased to be true. It is not honest to state that a medicine is manufactured by Moses Atwood, of Georgetown, Massachusetts, when it is manufactured by the Manhattan Medicine Company of the City of New York.

Any one has an unquestionable right to affix to articles manufactured by him a mark or device not previously appropriated, to distinguish them from articles of the same general character manufactured or sold by others. He may thus notify the public of the orgin of the article, and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded not only as a matter of justice to him, but to prevent imposition upon the public. Manuf'g. Co. v. Trainer, 101 U. S. 54.

The object of the trade-mark being to indicate, by its meaning or association, the orgin or owner-ship of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public and the very fraud accomplished, to prevent which the courts of equity interfere to protect the exclusive right of the orginal manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance.

This doctrine is illustrated and asserted in the case of Leather Cloth Co. (limited) v. American Leather Cloth Co. (limited,) which was elabor-

ately considered by Lord Chancellor Westbury, and afterwards in the house of lords on appeal from his decree. 4 De G., J. & S. 137, and 11 Clark, H. L. Cas. 523.

In that case an injunction was asked to restrain the defendant from using a trade-mark to designate leather cloth manufactured by it, which trade-mark the complainant claimed to own. The article known as leather cloth was an American invention, and was originally manufactured by J. R. & C. P. Crocket, at Newark, New Jersey. Agents of theirs sold the article in England as "Crockett's Leather Cloth." Afterwards a company was formed entitled "The Crockett International Leather Cloth Company," and the business previously carried on by the Crocketts was transferred to this company, which carried on business at Newark, in America, as a chartered company, and at West Ham, in England, as a partnership. In 1856 one Dodge took out a patent in England for tanning leather cloth and transferred it to this company. In 1857 the complainant company was incorporated, and the International company sold and assigned to it the business carried on at West Ham, together with the letters patent and full authority to use the trade-mark which had been previously used by it in England. A small part of the leather cloth manufactured by the complainant company was tanned or patented. It, however, used a label which represented that the articles stamped with it were the goods of the Crockett International Leather Cloth Company; that they were manufactured by J. R. & C. P. Crockett; that they were tanned leather cloth; that they were patented by a patent obtained in 1856, and were made either in the United States or at West Ham, in England. Each of these statements or representations was untrue as far as they applied to the goods made and sold by the complainant.

The defendant having used on goods manufactured by it a mark having some resemblance to that used by the complainant, the latter brought suit to enjoin the use. Vice-Chancellor Wood granted the injunction, but on appeal to the lord chancellor the decree was reversed and the bill dismissed. In giving his decision the lord chancellor said that the exclusive right to use a trade-mark with respect to a vendible commodity is rightly called property; that the jurisdiction of the court in the protection of trade-marks rests upon property; and that the court interferes by injunction because that is the only mode by which property of that description can be effectually protected. But he added:

"When the owner of the trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity."

And again:

"Where a symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or, other words, the right to the exclusive use of it can not be maintained."

When the case reached the house of lords the correctness of this doctrine was recognized by Lord Cranworth, who said that of the justice of the principle no one could doubt; that it is founded in honesty and good sense, and rests on authority as well as on principle, although the decision of the house was placed on another ground.

The soundness of the doctrine declared by the lord chancellor has been recognized in numerous cases. Indeed, it is but an application of the common maxim that he who seeks equity must present himself in court with clean hands. If his case discloses fraud or deception or misrepresentation on his part, relief there will be denied.

Long before the case cited was before the courts, this doctrine was applied when protection was sought in the use of trade-marks. In Pidding v. How, 8 Sim. 477, which was before Vice-Chancellor Shadwell in 1837, it appeared that the complainant was engaged in selling mixed tea, composed of different kinds of black tea, under the name of "Howqua's mixture," in packages having on three of their sides a printed label with those words. The defendant having sold tea under the same name, and in packages with similar labels, the complainant applied for an injunction to restrain him from so doing. An *ex parte* injunction, granted in the first instance, was dissolved, it appearing that the complainant had made false statements to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured. "It is a clear rule," said the vice-chancellor, "laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth."

In Perry v. Truefitt, 5 Beav. 66, which was before Lord Langdale, master of the rolls, in 1842, a similar ruling was had. There it appeared that one Leathart had invented a mixture for the hair, the secret and recipe for mixing which he had conveyed to plaintiff, a hair-dresser and perfumer, who gave the composition the name of "Medicated Mexican Balm," and sold it as "Perry's Medicated Mexican Balm." The defendant, one Truefitt, a rival hair-dresser and perfumer, commenced selling a composition similar to that of plaintiff, in bottles with labels closely resembling those used by him. He designated his composition and sold it as "Truefitt's Medicated Mexican Balm." The plaintiff thereupon filed his bill, alleging that the name or designation of "Medicated Mexican Balm" had become of great value to him as his trade-mark, and seeking to restrain the defendant from its use It ap-

peared, however, that the plaintiff, in his advertisements to the public, had falsely set forth that the composition was "a highly-concentrated extract from vegetable balsamic productions" of Mexico, and was prepared from "an original recipe of the learned J. F. Von Blumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiolgist;" and the court, therefore, refused the injunction, the master of the rolls holding that, in the face of such a misrepresentation, the court would not interpose in the first instance, citing with approval the decision in the case of Pidding v. Howe.

In a case in the superior court in the city of New York (Fetridge v. Wells, 4 Abb. Pr. 144) this subject was very elaborately and ably treated by Chief Justice Duer. The plaintiff there had purchased a recipe for making a certain cosmetic, which he sold under the name of "The Balm of a Thousand Flowers." The defendaats commenced the manufacture and sale of a similar article, which they called "The Balm of Ten Thousand Flowers." The complainant, claiming the name used by him as a trade-mark, brought suit to enjoin the defendants in the alleged infringement upon his rights. A temporary injunction was granted, but afterwards, upon the coming in of the proofs, it was dissolved. It appeared that the main ingredients of the compound were oil, ashes and alcohol, and not an extract or distillation from flowers. Instead of being a balm the compound was a soap. The court said it was evident that the name was given to it and used to deceive the public, to attract and impose upon purchasers: that no representation could be more material than that of the ingredients of a compound recommended and sold as a medicine; that that there was none so likely to induce confidence in its use, and none, when false, that would more probably be attended with injurious consequences. And it is also said: "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must themselves be free from imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they can not be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeits its name and character." See also Seabury v. Grosvenor, 14 Blatchf. 262; Hobbs v. Francais, 19 How. Pr. 567; Connell v. Reed, 128 Mass. 477; Palmer v. Harris, 60 Pa. St. 156.

The doctrine enunciated in all these cases is founded in honesty and good sense; it rebukes fraud and encourages fair dealing with the public. In conformity with it, this case has no standing before a court of equity. The decree of the court below dismissing the bill must therefore be affirmed and it is so ordered.

"OPTION DEALS"—VALID CONTRACTS BY AGENT—"CORNERS."

KENT v. MILTENBERGER.

St. Louis Court of Appeals, May 1, 1883.

1. A man, though not a dealer in wheat, may lawfully employ a broker on an exchange to sell wheat for him for delivery at a future time, and to execute the contract for him by purchasing upon the market the wheat for delivery when the time for delivery arrives, or by settling with the purchaser upon payment of the difference between the contract price and the market price, if the purchaser shall waive the execution of the contract by the delivery of the wheat according to its terms. To render such a contract unlawful, it must appear that there was a contemporaneous agreement that it should not be executed by delivery, but only by settlement of differences.

2. The plaintiffs having made for defendant lawful contracts, as his agents, which contracts they, as his agents, executed and discharged in a lawful manner, in consequence of all which defendant incurred an indebtedness to plaintiffs, he can not avoid his liability to plaintiffs by setting up that his intention in making the contracts was to bet upon the future price of grain, and not to buy, and that plaintiffs knew this.

3. The contract being valid according to its terms, the burden was on defendant to show by extrinsic evidence its invalidity, if this could be done.

4. The plaintiffs, under the rules of the exchange in which the dealings were had, were not bound to settle upon the basis of a fictitious and manipulated market, and can charge against their principal only the losses which they sustained by settling in the average market for the purposes of consumption; and it is part of their case to show what the market price of the wheat, at the time of delivery, was, in a fair market.

Given Campbell, for respondent; *Overall & Judson*, for appellants.

THOMPSON, J., delivered the opinion of the court:

This is an action to recover a sum of money claimed to be due to the plaintiffs from the defendant, on account of certain sales of wheat for future delivery made by the former, as brokers for the latter, on the floor of the Merchants' Exchange of St. Louis. The sales were of the aggregate amount of 55,000 bushels, a part of it deliverable at any time during the month of August, 1880, and part of it any time during October, at the option of the seller, and a part at any time during that year, at the option of the seller. These sales were made at different times and represent several different transactions. Each of them was made by a contract in writing by the plaintiffs, acting toward the other contracting party as principal contractors. These contracts were all made in the same form upon a printed blank, which is used for that purpose. One of them, which was put in evidence, will serve as an example of all the others. It read as follows:

"(88 3-4 c.) GRAIN CONTRACT.

"St. Louis, July 31, 1880.

"We have this day bought of E. A. Kent & Co.

five thousand bushels No two red winter wheat at eighty-eight and three-quarters cents per bushel, to be delivered at sellers' option, during the month of October, 1880, in regular elevator. This contract is subject in all respects to the rules and regulations of the Merchants' Exchange of the City of St. Louis.

REDMOND, CLEARY & Co. B."

It is thus perceived that these contracts were what are known in the slang of the exchange as "option deals," the seller having an option to make delivery of the commodity sold within certain days. There is much evidence in the record as to the general character of these contracts and the manner in which they are executed and discharged. It appears that delivery is always contemplated, not as a thing which will be necessarily insisted upon, but as a thing which the purchaser may insist upon. It sufficiently appears that this is the one thing which gives vitality to such contracts and which enables those who, during a particular month are on the successful side of them, to get up what is known as a "corner." This happens when a much greater amount of any given commodity has been sold for future delivery within a given period than can be purchased in the market. The buyers, who are called in the slang of the Exchanges the "longs," then insist upon delivery, and by this means succeed in running up the prices to a fictitious point, at which the "deals" are "rung out," between the dealers by the payment of differences, or where the purchasers insist upon it, by actual delivery. A very large majority of these transactions are, no doubt, merely speculative, but many of them are actual purchases by manufacturers and exporters, For instance, a miller knows that in his business he will consume so many thousand bushels of wheat during a certain month. When the market is favorable he buys upon the Exchange this much wheat upon one of these contracts, by which the seller has the option of delivering the wheat at any time during the succeeding month, and an exporter, forcasting the market, may buy for exportation in the same way.

The defenses to this action were, that the contracts were gambling contracts, mere wagers or bets, on the future state of the market, and that some of them were settled on the basis for fictitious and manipulated market, contrary to the rules of the Merchants' Exchange, which settlement resulted in the loss which the plaintiffs are now asking the defendant to make good.

1. As to the validity of these contracts. From what has been said concerning them, it appears that there is no essential difference between them and the numerous contracts of the same kind which have been before the courts of England and in this country, and which have been almost uniformly upheld as valid contracts. All these decisions unite upon the proposition that these contracts are presumptively valid, but that though valid on their face they may be shown by extrinsic evidence to have been intended by the contracting parties, not as commercial transactions, but as mere wagers on the future state of the market; that the one thing that makes them wagers and renders them invalid is an agreement between the contracting parties made at the time of the contract and understood as part thereof, that the contract may be discharged by the seller, not by the delivery of the commodity sold, but by paying to the purchaser the difference between the market price on the last day of the performance of the contract and the price at which the sale was made; or, on the other hand, that the purchaser, if the market goes the other way, shall not be bound to receive the commodity purchased, but may settle by the payment of a difference, will not, if made subsequently to the making of the contract itself, taint the contract and render it invalid in law. Sawer v. Taggart, 14 Bush. 727, 734; Williams v. Tiedeman, 6 Mo. App, 269.

This agreement, contemporaneous with the contract, that it may be discharged, not by actual delivery, but by the payment of differences, or by "ringing out," as it is expressed in the slang of the exchanges, is therefore the one thing which renders the contract void. That was the agreement in Waterman v. Buckland, 1 Mo. App. 45, and this court held the contract void, just as we should do now if the evidence disclosed a like contract. But there is no evidence in this case of such agreement, either between the plaintiffs and the defendant, or between the plaintiffs and the parties to whom they sold the wheat for the defendant. There was therefore no question to go to the jury as to whether or not this was a gambling contract, unless the learned counsel for the defendant was right in another proposition which we shall consider.

The defendant was, like the plaintiffs, a member of the St. Louis Exchange. He was not, however, a dealer in grain, but he dealt in liquors. He had no wheat to sell in the sense of having it in his actual possession, or expecting to have it in his actual possession, and he did not wish to buy any wheat in the sense of receiving it in kind for any purpose connected with the business in which he was engaged. He simply bought and sold, as hundreds do, for speculation. There is nothing unlawful in this. The law puts no restraint upon trade which renders it unlawful for a man to buy or sell commodities, in which he does not generally deal, if he thinks he can catch a favorable turn of the market and make money by so doing. What one man is at liberty to do in this respect another man is equally at liberty to do. Furthermore, the fact that a man does not have on hand a commodity which he undertakes to sell for future delivery at the time when he makes the sale, and that he does not expect to have it on hand until the time arrives for delivery, but that he expects then to go upon the market and purchase it for delivery in pursuance of his contract, does not in any degree impair its validity. Wil-

liams v. Tiedemann, 6 Mo. App. 269; Nibblewhite v. McMorine, 4 Mees. & W. 462; Sawyer v. Taggart, 14 Bush. 727; Smith v. Bouvier, 70 Pa. St. 325. What he may do by himself in this respect he may obviously do by the agency of another. He may employ a broker to make the contract for him and to execute it for him in any manner in which it would be lawful for him to make it and execute it if acting for himself in person. Any man, although not a dealer in wheat, may therefore lawfully employ a broker on Exchange to sell wheat for him for delivery at a future time and to execute the contract for him by purchasing upon the market the wheat for delivery when the time arrives for its delivery, or by settling with the purchaser upon the payment of the difference between the contract price and the market price, if the purchaser shall waive the execution of the contract by the delivery of the wheat, according to its terms.

Now, that was precisely the contract which the defendant made with the plaintiffs in each of the transactions involved in this suit. There was not only no agreement that the contracts which the plaintiffs made for the defendant should be settled without delivery, but the contracts on their face imported the contrary, and not a word was written or said indicating that it was the intention that the contracts should be in any respect different from what they imported to be on their face. Both the plaintiffs and the defendant, being members of the Exchange, knew that contracts of this kind, made on the floor of the Exchange, and subject to the rules of the Exchange, would have to be executed by actual delivery, if delivery should be insisted upon. They moreover knew that the plaintiffs, placing themselves under the rules of the Exchange, toward the purchaser of the wheat, in the position of principal contracting parties, would have to make good the contracts upon their own responsibility if necessary, and would, if delivery should be demanded when the time came, have to go upon the market and purchase the wheat for delivery. They not only knew that this would have to be done, but the evidence shows that, as to a part of those transactions, it actually was done; that the plaintiffs, in the execution of the contract involved in these suits, actually purchased and delivered 25,000 bushels of wheat for the defendants. The fact that the contracts for the delivery of the remaining 30,000 bushels were settled by the payment of differences, upon a subsequent waiver of actual delivery by the purchaser, neither rendered them unlawful in their inception nor in their final execution; for it has never been held that a lawful contract may not be discharged by the voluntary act of the obligee in accepting a pecuniary equivalent for its performance.

In this state of facts, what is the evidence upon which the defendant seeks to impeach its validity? It is his own testimony to the effect that, although the contract was such as is above named, yet his intention was not to buy or sell, but to gamble, and that the plaintiffs knew that this was his intention and made themselves the instruments of carrying out the same. He simply says in his testimony that these transactions were "option dealing:" that by "option dealing" he meant selling or buying wheat with the expectation of catching an advance or decline, betting that the price will go up or down, and that the plaintiffs were apprised of his intention in these matters. This, in connection with the fact that he was not a dealer in wheat, and had never bought or sold wheat for use or exportation, which fact was known to the plaintiffs, is the ground on which the court was asked to give the following instruction:

(2.) The court instructs the jury, that if they believe from the evidence that defendant, in all the transactions in question, had no expectation or intention of delivering the wheat, alleged to be sold by plaintiffs on his behalf, but only contemplated in such transactions speculative wagers upon the changes in the market prices of wheat, to be settled by payment of differences only, and that plaintiffs were at the time of said transactions fully cognizant of and participated in this expectation and intention, and actually abetted, with such knowledge, said purpose of defendant, then it is immaterial that, as to parts of said transactions, plaintiffs made sales to third parties, as agents or brokers, and your verdict must be for defendant."

We think that the court committed no error in refusing this instruction. By holding otherwise we should, in effect, permit the defendant to say: The plaintiffs, acting as my agents, made certain lawful contracts; they executed and discharged them for me in a lawful manner, and by their doing this I have incurred an indebtedness to them, but I ought not to pay this indebtedness, because my intentions were really unlawful and they knew it.

We have not overlooked the case of Fariera v. Gabell, 89 Pa.. St. 89. That case fully sustains the defendant's position, but no opinion was delivered by the Supreme Court other than a statement that the charge of the court at *nisi prius* was in accordance with former decisions of that court, and was approved. We can not reconcile it with the doctrine announced by the same court in Smith v. Bouvier, 70 Pa. St. 325; and Bruas' App., 55 Pa. St. 294. It is pointedly opposed to the doctrine of nearly all the well considered cases on the subject, and especially that of Lehman v. Strassburger, 2 Wood, C. C. 554, and Sawyer v. Faggart, 14 Bush. 729. The doctrine there laid down can not be reasoned upon without the result is reached, that it involves an entire denial of the doctrine that the circumstances which renders these contracts unlawful is a contemporaneous agreement that they shall not be executed by delivery but only by a settlement of differences. Unless there is such an agreement it is idle to talk about gambling intent, or wagering intent, or bets upon the future state of the market; because this is a mere play upon words. Every intent to

speculate becomes in the opinion of some a gambling intent, and every mercantile venture involves in the same view a bet upon the state of the market. The law has distinctly defined the characteristic of a gambling contract when it takes the outward form of buying or selling for future delivery. To that definition we must adhere. The rule which we are asked to assent to by the learned counsel for the defendant in this case remits the whole subject to the loose discretion of juries, and puts it entirely at sea.

There is nothing in the case of Barnard v. Backhaus, 52 Wis. 593, which necessarilly conflicts what we hold in this case. There, some of the contracts, which entered into the consideration of the note sued on, "were contracts to pay the difference between the price of wheat, at the time the contracts were made, and the price at a subsequent time." Ibid. p. 601. The court deemed it "clearly and satisfactorily proven that, in respect of some of the transactions, none of the parties intended an actual sale and purchase of wheat, but that the whole thing was to be settled by payment of differences." The court held, just as we should have held upon similar proof, that such transactions were gambling transactions, and that part of the consideration of the note, given to the broker, being tainted and void, the whole note was void.

The same may be said of Tenney v. Foot, 4 Bradw. 594; s. c., affirmed, 95 Ill. 99, 109. Whatever may have been said in the decision of that case by the learned circuit judge, whose opinion was approved by the appellate court and by the supreme court, the indisputable fact was, that the agreement between the principal and the broker was, that the dealings of the latter for the former "should only be in options, and that no produce should be delivered or received on his account, but that the transactions should be settled upon the differences." "This contract," added the learned judge, "was fully proved, and without any conflict of evidence to it" (4 Bradw. 597). Now, as there was a statute in Illinois prohibiting the dealing in "options," was very clear that a note springing out of such a consideration, was void. Upon such a state of facts, we should hold the same way without the aid of such a statute. But in this case there was no such a contract.

2. Another point made for the defendant is, that the court erred in ruling that the burden of proof devolved on the defendant, to show the intent of the unknown principal parties, with whom the plaintiffs dealt in their own names for the defendant. We understand that such is not the law. These contracts were valid, according to their terms, though it was competent to show by extrinsic evidence that they were invalid. They were, therefore, presumptively valid, and the burden of showing their invalidity lay upon the defendant, who attempted to impeach their validity.

3. The last question relates to the settlement of the transaction, known as the "August Deal," that is, the sales which the plaintiffs made for the defendant's account of wheat, to be belivered at any time during the month of August, 1880, at the sellers option. There was a loss on these transactions which the plaintiffs, acting as principal contractors, had to make good. It appears that this "deal" was settled according to the ruling market at the end of that month. But this market had been forced up to a fictitious point by a combination of dealers, in getting up what is called a "corner." The evidence upon this point is not conflicting. Now the rules of the Merchants Exchange, which were a part of these contracts, contain the following provisions:

Section 4. "In case any property contracted for future delivery is not delivered at maturity o contract, the purchaser may demand a settlement at the average market value of the property on the day of maturity of contract, and in case such settlement is refused, may purchase the property on the market for accout of the seller during the same or the next business day, notifying him at once of such purchase, and any loss shall be due and payable at once by the party in default; * * but nothing in this section shall be construed as authorizing unjust or unreasonable claims based upon manipulated or fictitious markets. * * * *

Section 5. In determining the average market value of any article, the committee named, or, in case of arbitration, the Committee of Arbitration and Appeals, shall consider its value in other markets or for manufacturing or consumptive purposes in this market, together with such other facts as may justly enter into a determination of its true value, to secure justice and equity to all concerned, irrespective of any fictitious price it may at the time be selling for in the market." * *

There was no evidence as to what the value of wheat at the end of August, 1880, was either in other markets or in this market, for "manufacturing or consumptive purposes." The defendant asked the court to instruct the jury that the burden was upon the plaintiffs to show what such market value was, and court refused so to instruct them. We think that this was error. The plaintiffs were not obliged to settle these transactions upon the basis of a fictitious and manipulated market, produced by "cornering." If they did so, they did so in their own wrong, because they could have avoided this under the rules of the Exchange by demanding an arbitration. They can not, therefore, rightfully charge up against their principal any loss which they may have sustained while acting as his brokers, in this way. As between him and them, the only market on the basis of which they can claim a settlement or charge losses against him, is an average market for manufacturing or consumptive purposes. It is just as much a part of their case to show what that market was as to show what their contract with the defendant was.

Upon this last point alone, we feel constrained to reverse the judgment and remand the cause. It is so ordered. All the judges concur.

CORPORATION— MEMBERSHIP OF BOARD OF TRADE — NOT SUBJECT TO EXECUTION.

BARCLAY v. SMITH.

Supreme Court of Illinois, May 10, 1883.

A certificate of membership in the board of trade of Chicago, only entitling the holder to attend the meetings of the board and deal in the various products of the country, etc., but not entitling him to any dividends or pecuniary profits, though a valuable privilege, is not property, and is not subject to sale for the member's debts.

CRAIG, J., delivered the opinion of the court:

There is but one question presented by the record and that is, whether a certificate of membership in the Board of Trade in the City of Chicago is property which is liable to be subjected to the payment of the debts of the holder by legal proceedings. The Board of Trade of Chicago is a corporation created by a special act of the legislature of the State, with power to sue and be sued, to purchase and hold property not to exceed at any time $200,000. The objects of the corporation, as declared by the charter and by-laws, are "to maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information; and, generally, to secure to its members the benefit of co-operation in the furtherance of their legitimate pursuits."

By the twelfth section of the charter the corporation is prohibited from transacting any business excepting such as is usual in the management of boards of trade or chambers of commerce. No dividends whatever are made among the members of the corporation. No person can become a member unless he receives the votes of not less than ten of the board of directors. A certificate of membership is transferable in the books of the association to any person eligible to membership who may be approved by the board of directors after due notice. The corporation has power to make by-laws for the management of its business and the mode in which it shall be be transacted. Under the by-laws the board of directors are required to provide necessary rooms and offices for the purposes of the association, which shall be kept open on all business days during certain hours for the admission of its members.

From an examination of the charter and by-laws of the corporation it is apparent that no member receives any pecuniary profit from the corporation or from its capital or revenue, except such advantage in the way of trade that he may derive from the mere privilege of being a member and from being admitted to transact business in the rooms of the board. If dividends were authorized to be declared among the members as stockholders of the earnings or accumulations of money or property, there might be some ground for holding that a certificate of membership was property and liable to be taken for the debts of the members, but such is not the case. However much money or property may be accumulated by the board it is powerless to declare a dividend among its members.

When the nature and object of a certificate of membership is understood, can it upon any reasonable principle be said to be property? In Bouvier's Law Dictionary the author, under the head of property, gives a definition as follows: "The right and interest which a man has in lands and chattels to the exclusion of others." The author also announces the rule that property considered as an exclusive right to things contains not only the right to use those things, but a right to dispose of them as the owner may desire. The certificate of membership is neither lands nor chattels, nor can a member dispose of his membership as he pleases. A sale can only be made to such person as the board, through its directors, may determine. If, then, a certificate of membership is property, it does not fall within the definition given, nor do we know of any definition of property within which it would fall. It may be said that a certificate of membership has a large value and hence ought to be regarded as property. It is true that the board requires a person who becomes a member to pay an initiation fee of $5,000, and the evidence shows that a certificate of membership is regarded in the market is worth $4,000, but this does not change the character of the right. A church organized under our statute may own property for the uses and privileges of its members worth as much as the property possessed by the Board of Trade, and the right of a member to attend the meetings of the church and occupy a pew may be regarded as a high and valuable right, and yet the right of membership has never been regarded as property which may be subjected to the payment of the debts of a member. The same may also be said in regard to the membership in a Masonic lodge or a social club, and various other organizations of a similar character There may be, and doubtless are, many privileges which a man may possess that are valuable to him which do not fall within the definition of property and which may be enjoyed but can not be subjected to the payment of debts. A liquor dealer may be licensed to sell liquor at a certain place for a certain time, for which privilege he is required to pay $1,000 per annum. That privilege is worth to him much more than he is required to pay. But is that privilege property which may be sold on execution or reached by a creditor's bill for the payment of debts? We have never so understood the law. A pedler or an auctioneer may be licensed to carry on their vocation within a certain district for which they may pay a stipulated sum of money, the profits arising

from the privilege of exercising the right may be much larger than can be earned by a person exercising the right to transact business on the floor of the Board of Trade, and yet we have never understood that such a privilege was liable to be seized and sold in satisfaction of debts. The attorney and physician are licensed to practice their professions; it costs money to obtain such a privilege; it may be, and is a valuable right, and yet such a right can not be taken by a creditor's bill and sold in satisfaction of a debt. The same may be said in regard to various other privileges which may be and often are conferred upon persons in different pursuits of life.

A certificate of membership in the Board of Trade of Chicago empowers the person who is admitted as a member to attend the meetings of the board and deal in the various products of the country.

This right to appear at a certain place and transact certain business, in our judgment is not property, but it is a mere privilege conferred upon the member which can not be reached and sold by the process of courts. It is a right which may be regarded as valuable, but which can not be diverted or destroyed except by the Board itself, for failure of its members to conform to the rules and regulations of the association. This view is in harmony with the rule announced by the Supreme Court of the State of Pennsylvania, where a similar question arose. Thompson v. Adams, 93 Pa. St. 55; Pancoast v. Gowan, 93 Pa. St. 66.

We have been referred to some cases which seemed to hold a different view, but without entering upon a review of the cases cited we do not think they establish the correct rule, and we are not inclined to follow them.

The judgment of the appellate court will be reversed and the cause remanded.

Reversed and remanded.

WEEKLY DIGEST OF RECENT CASES.

1. APPEAL—FINAL DECREE.

A decree is final for the purposes of an appeal when it terminates the litigation between the parties, and leaves nothing to be done but to enforce by execution what has been determined. Where a decree settles every dispute between the parties, and leaves nothing to be done but to complete the sale under the foreclosure proceedings in the State court, and hand over to complainant any surplus there may be after satisfying the mortgage debt, it is a final decree for the purposes of an appeal. *Ex parte Norton*, U. S. S. C., April 2, 1883; 2 S. C. Rep. 490.

2. CONTRACT—GIVING NEW OBLIGATION—EXTINGUISHMENT OF FORMER UNDERTAKING.

Where a defendant in an action of forcible entry and detainer, on an appeal from a judgment of a justice of the peace, gave an appeal bond in the penal sum of $500, and afterward, by an order of the court, gave another bond in the sum of $1,200, and again, under an order of the court to "file a good and sufficient new appeal bond" by a day named, gave a new bond in the penalty of $2,000, with other and different sureties, it was *held*, in an action on the second of these bonds, that the giving and approval of the last bond in the case operated as a discharge and extinguishment of the prior bonds, and that such last bond embraced and covered all the appellant's liabilities growing out of the appeal, and that no recovery could be had on the second bond. *International Bank v. Poppen*, S. C. Ill., March Term, 1883; Reporter's Advance Sheets of 105 Ill. 491.

3. CONTRACT—ILLEGALITY, HOW FAR A DEFENSE.

While courts will not enforce an illegal contract between the parties, yet if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other property belonging to his principal, he is bound to turn it over to him, and can not shield himself from liability therefor upon the ground of the illegality of the original transaction. *Norton v. Blinn*, S. C. Ohio, May 8, 1883.

4. FRAUDULENT CONVEYANCE—REMEDY OF JUDGMENT CREDITOR—EJECTMENT—BILL IN EQUITY.

Where a judgment creditor desires to avoid an alleged fraudulent and voluntary conveyance of land by his debtor, his proper course is to levy on the land, buy in the same at sheriff's sale, and bring an action of ejectment. He is not entitled to relief in equity. A creditor having obtained judgment against his debtor, issued a *fi. fa.*, which was levied upon certain land which the debtor had previously voluntarily conveyed. The creditor then filed a bill in equity against the parties to whom the land had been conveyed, alleging that the conveyance was fraudulent and void as to him, and praying a decree to that effect, and also that defendants be restrained by injunction from conveying or encumbering the land: *Held*, that the complainant was not entitled to the relief sought, as he had a full, complete and adequate remedy at law. *Appeal of the Girard Nat. Bank*, S. C. Pa., Jan. 15, 1883; 13 W. N. C., 101.

5. GUARANTY—CONTINUING GUARANTY.

A guaranty in these words, "Please let Mr. John Newman have credit for goods to the amount of $100, and for the payment of which I hold myself responsible:" *Held*, to be a continuing guaranty, and the limitation therein is as to the amount for which the guarantor will hold himself liable, and not as to the credit to be given. *Tootle v. Elgutter*, S. C. Neb., March 20, 1883; 15 N. W. Rep. 228.

6. INSURANCE, FIRE—"GUNPOWDER AND PETROLEUM"—CUSTOM OF TRADE.

Where a policy on the assured's "general stock of hardware and agricultural implements," in a village in this State, provided that "if the assured shall keep gunpowder [or] petroleum, without written permission in this policy, then this policy shall be void," and in an action on the policy the

insurer relies on a breach of the condition, evidence is not admissible to show a custom among hardware dealers in the villages in Ohio to keep for sale such articles, in quantities, as part of the stock. *Beer v. Forest City Mut. Ins. Co.*, S. C. Ohio, May 1, 1883; 3 Oh. L. J. 605.

7. INSURANCE, FIRE—SALE OF PREMISES—SUBROGATION OF INSURER.

The defendants, the owners of a house insured in the plaintiffs' office against fire, contracted to sell it to a purchaser. After the date of the contract, but before the completion of the purchase, the house was damaged by fire, and the plaintiffs, who were not aware of the contract for sale, paid the defendants for the damage done. The purchase having been subsequently completed: *Held*, that the plaintiffs were entitled to recover from the defendants the amount they had paid, on the principle of subrogation. *Held, further*, that a contract of fire insurance is a mere contract of indemnity, and that the insurer, on payment, is entitled to be subrogated to every right of the assured—whether in contract or in tort—which is capable of being insisted upon, and to every other right—whether it has accrued or not—which may result in diminishing the loss of the assured. *Castellain v. Preston*, Eng. Ct. App., March 12, 1883· 31 W. R. 557.

8. INSURANCE, FIRE—VALUE STATED IN APPLICATION.

In an application for insurance, M covenanted and agreed that the insurance asked for on his dwelling did not exceed two-thirds of its actual cash value. The policy insured it for the sum asked for and made the application part of the contract. During the term a fire destroyed the building. In a suit on the policy issue was joined upon an averment by the company that said covenant was untrue, as the applicant well knew when he made it. At the trial conflicting evidence on this issue was before the jury, but the court directed a verdict for the plaintiff for "the value of the property destroyed by fire covered by the policy of insurance described in this case, not exceeding the amount of insurance upon the part thus destroyed," and refused to give any instruction applicable to the issue as to the covenant. *Held*, This was error. *Farmers Ins. Co. v. McCluckin*, S. C. Ohio, May 8, 1883.

9. INSURANCE, LIFE—ACCIDENT POLICY—POISON.

A mutual accident insurance company issued a certificate of membership or policy of insurance upon the life of one A. The certificate provided that the amount specified therein should be paid only on clear proof that the death of the party insured "was caused by external violence and accidental means;" no payment was to be made if the death was caused "by the taking of poison," or was "the result of design either on the part of the member or of any other person." A died in consequence of his having taken a certain deadly poison which he mistook for a harmless beverage: *Held*, that, notwithstanding the poison was innocently taken, the company was not liable under the terms of the certificate. *Pollock* v. *United States Mut Accident Ass'n.*, S. C. Pa., Feb. 12, 1883; 12 W. N. C. 559.

10. JURY TRIAL—COMPETENCY OF JUROR—INTEREST.

1. A person who belongs to a religious denomination, such as the Lutheran, is not thereby precluded from sitting as a juror in a case where a church organization of the same denomination, of which he is not a member, is a party. *Barton v. Erickson*, S. C. Neb., March 20, 1883; 15 N. W. Rep. 206.

11. JURY TRIAL—INCOMPETENCY OF JUROR BECAUSE OF NON AGE.

After the rendition of the verdict it is too late to object on the ground of the want of proper age of a juror, or of the party's previous ignorance of the fact. *Johns v. Hodges*, Md. Ct. App.: 10 Md. L. Rec. No. 12.

12. NEGLIGENCE—MASTER AND SERVANT—DEFECTIVE APPLIANCES.

The defendant received into its service from another railway company a freight car which proved to be in disrepair, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car in question with another car, was severely injured in consequence of its defective and imperfect condition, which was not known to him, but was discoverable on proper inspection. *Held*, that, as respects such defects, the company were answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. The duty to provide suitable instrumentalities for its employes to work with can not be delegated to a servant so as to relieve the company from responsibility, and this duty extends to the machinery, cars and railway track upon or in connection with which they are employed. An employe is not bound by a rule of the company which has not been properly published or brought to his attention, and which it has habitually neglected to enforce. *Fay v. Minneapolis etc. R. Co.*, S. C. Minn., Feb. 20, 1883; 15 N. W. R. 241.

13. NUISANCE — TEMPORARY OBSTRUCTION OF HIGHWAYS.

Temporary obstructions in a street, which are reasonable and necessary for the erection of a building upon an adjoining lot, do not constitute a nuisance, provided they are not unreasonably prolonged. *State ex rel. v. Omaha*, S. C. Neb., March 20, 1883; 15 N. W. Rep. 210.

14. PATENT—REISSUE—WASHBOARDS.

Reissued letters patent No. 6,673, granted to Mrs P. Duff, E. A. Kitzmiller and R. P. Duff, October 5, 1875, for an "improvement in washboards," on the surrender of the original letters patent No. 111,585, granted to Westly Todd, as inventor, February 7, 1871, are not infringed by a washboard constructed in accordance with the description contained in letters patent No. 171,568, granted to Aaron J. Hull, December 28, 1875. In view of prior inventions, the claims of the Todd patent must be limited to the form shown, namely, projections bounded by crossing horizontal and verticle grooves, and do not cover diamond-shaped projections bounded by crossing diagonal grooves. In the field of wash-boards, made of metal, with the surface broken into, protuberances formed the body of the metal, so as to make a rasping surface, and to strengthen the metal by its shape, and to provide channels for the water to run off, Todd was not a pioneer, but merely devised a new form to accomplish those results; and his patent does not cover a form which is a substantial departure from his. *Duff v. Sterling Pump Co.*, U. S. S. C., April 2, 1883; 2 S. C. Rep. 487.

4. REMOVAL OF CAUSES—FAILURE TO FILE RECORD.

Where, upon the removal of a cause from a State court, the copy of the record is not filed within the time fixed by statute, it is within the legal discretion of the Federal court to remand the cause, and the order remanding it for that reason should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised. If, upon the first removal, the Federal court declines to proceed, and remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled, under existing laws, to file in the State court a second petition for removal upon the same ground. *St. Paul, etc. R. Co. v. McLean*, U. S. S. C., April 2, 1883; 2 S. C. Rep. 498.

15. REVENUE LAWS—CUSTOMS OFFICERS — PORTS OF ENTRY AND DELIVERY.

A person was surveyor of customs at the port of Troy, New York, a port of delivery and not a port of entry, in the collection district of the city of New York, from June 13, 1872, to May, 1876. At various times during the period from June 13, 1872, to June 22, 1874, there was a surveyor of customs at the port of New York, which was a port of entry, and surveyors of customs at two other ports, which were ports of delivery and not ports of entry, all of said ports being in said collection district. In accordance with the uniform practice of the treasury department, under sec. 1 of the act of March 2, 1867, ch. 188 (14 Stat. at Large, 546), the secretary of the treasury distributed to the collector, naval officer and surveyor at the port of New York, as such officers, and not as informers or seizing officers, one-fourth part of the proceeds of fines, penalties and forfeitures incured at the port of New York between June 13, 1872, and June 22, 1874, and paid no part thereof to the surveyor at Troy. He sued the United States in the court of claims in May, 1877, claiming to share equally with the collector and the naval officer at the port of New York, and all the surveyors in the district, in said one-fourth, under the provisions of sec. 1 of said act. As said provisions had been repealed by section 2 of the act of June 22, 1874, ch. 391 (18 Stat. at Large, 186), and as Congress had not interfered with such construction while the act was in force, and as the claimant had raised no question in regard to such construction until March, 1874, and had been informed by the treasury department in June, 1874, that it adhered to such construction, and had not complained again until March, 1877, but had permitted moneys to be distributed under such view until he sued, the court of claims held that, as such construction did not appear unreasonable, and might well have been reached in the exercise of a sound judgment, all the circumstances of the case were such, regarding the statute as ambiguous, as to justify the application of the principle of interpretation that the contemporaneous construction of those who had been called upon to carry the law into effect was entitled to great respect, and it refused to interfere with such construction. This court being satisfied with the decision of the court of claims, and with the grounds above stated as assigned by it therefor, affirmed its judgment. *Hahn v. United States*, U. S. S. C., April 9, 1883; 2 S. C. Rep. 494.

17. STATUTE OF FRAUDS — GUARANTY — DEBT OF ANOTHER.

Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing. In such case the promisor assumes the payment of the debt. *Fitzgerald v. Morrisey*, S. C. Neb., March 20, 1883; 15 N. W. Rep. 233.

18. TAXATION — RAILROAD DIVIDENDS — EARNED DURING THE WAR WITHIN THE CONFEDERATE LINES.

The dividends earned by a railroad corporation during the late civil war, by operating its lines within Confederate territory after military possession had been taken by the United States of the territory in which the principal offices were located, are not exempt from the income tax imposed by the act of 1862, ch. 119, because the resolution declaring such dividends was adopted within the Confederate lines, and the payments on account of which the taxes were demanded were made there. As it was the intention of Congress to tax only such payments as were, either in fact or in legal effect, made from the income, payments of interest made by a railroad in reorganizing its affairs for future business at the close of the war, by funding its past-due coupons in a new issue of bonds, or by the sale of such new bonds, are not taxable. Upon examination, the ruling of the court as to the exclusion of evidence, and the instruction to the jury in relation to the alleged compromise between the United States and the railroad company, are sustained. *Memphis, etc. R. Co. v. United States*, U. S. S. C., April 2, 1883; 2 S. C. Rep., 482.

RECENT LEGAL LITERATURE.

WALKER'S AMERICAN LAW. — Introduction to American Law designed as a First Book for Students. By Timothy Walker, LL.D. Eighth Edition. Revised by M. F. Force. Boston, 1882: Little, Brown & Co.

After all is said in the way of criticism of law books, the real test of merit in this day, when the lives of the best of them seem so ephemeral, is staying power. A work which is able, not only to make its way into the libraries and favor of the profession, but can stay there with a continued career of usefulness unimpaired, gives such indisputable evidence of intrinsic worth, as entitle it to the continued confidence of the profession. Tried by this test, the volume before us may claim a place in the highest rank of excellence. It was first published in 1837 and during the forty-five years, that have since elapsed it has been one of the most popular treatises on elementary law in use in law schools and by students. Gentlemen whose first distinct conception of our system was derived from its pages nearly a half century ago, have grown old in the harness and as reverend seniors, use it still in the instruction of their legal proteges. Such a history shows, not only that the work was well and aptly designed but the much rarer excellence, that it was well executed. The notes of this edition bring the citations down to the present time.